Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1551

SIX NATIONS CONFEDERACY,

Petitioner,

v.

CECIL ANDRUS,
Secretary of the Interior, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES
October Term 1979

No.

SIX NATIONS CONFEDERACY, Petitioner,

v.

CECIL ANDRUS, Secretary of the Interior, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Six Nations Confederacy petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia in this case.

OPINION BELOW

The opinion of the Court of Appeals (App. A, infra, 1a-6a) is reported at 610 F.2d 996 (D.C.Cir. 1979). The District Court's opinion is reported at 447 F.Supp. 40 (D.D.C. 1977).

JURISDICTION

The judgment of the Court of Appeals was entered on November 30, 1979 (App. infra, 1a-6a). Petitioner's suggestion for rehearing en banc was denied on January 4, 1980 (App. infra, 7a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Congress has precluded the United States District Courts and Courts of Appeals from entertaining an action for declaratory and injunctive relief brought by the governing Grand Council of the Six Nations Confederacy which claims that the Indian Claims Commission Act (25 U.S.C. 70 et seq.) is unconstitutional, on its face and as applied by the Commission, insofar as that Act has permitted historic legal claims of the Six Nations Confederacy to be prosecuted and disposed of by individuals and groups who have had no authority to represent or take legal action on behalf of the Six Nations Confederacy.

STATUTORY PROVISIONS INVOLVED

The Indian Claims Commission Act of 1946, ch. 959, §1, 60 Stat. 1049, 25 U.S.C. 70 et seq., provides in pertinent part:

> §70i. Any claim within the provisions of this chapter may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as

> the representative of all its members; but wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission.
>
> §70p. The Commission shall give reasonable notice to the interested parties and an opportunity for them to be heard and to present evidence before making any final determination upon any claim. Hearings may be held in any part of the United States or in the Territory of Alaska.
>
> §70s(b). . . . At any time within three months from the date of the filing of the determination of the Commission with the clerk either party may appeal from the determination of the Commission to the Court of Claims, which Court shall have exclusive jurisdiction to affirm, modify, or set aside such final determination. . . .
>
> §70t. In each claim, after the proceedings have been finally concluded, the Commission shall promptly submit its report to Congress. . . .
>
> §70u(a). When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final

judgment of the Court of Claims, and there is authorized to be appropriated such sums as are necessary to pay the final determination of the Commission.

The payment of any claim, after its determination in accordance with this chapter, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

§70u(b). A final determination against a claimant made and reported in accordance with this chapter shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

STATEMENT

Petitioner Six Nations Confederacy* (Six Nations) is a confederation of the Onondaga, Mohawk, Seneca, Oneida, Cayuga and Tuscarora Nations, which pre-dates the formation of the

*The Six Nations Confederacy is properly known as the Haudinosaunee or Six Nations Iroquois Confederacy. The name "Six Nations" is used in the written version of the treaties made with the United States. See, e.g., Treaty of Fort Stanwix, October 22, 1784, 7 Stat. 15; Treaty of Canandaigua, November 11, 1794, 7 Stat. 44.

United States government. Representatives from each of the confederated nations constitute the Grand Council, the governing body of the Six Nations (J.App.* 104-106, 134,137). It continues today as the central government of the member nations with its seat at the Onondaga Nation near Syracuse, New York.

Respondents are Cecil Andrus, Secretary of the Interior, and the Indian Claims Commissioners.**

The Six Nations has sought through this action to preserve an essential element of its governmental authority: the power to determine and control whatever legal actions might be undertaken with respect to the Six Nations' interests in its treaties with the United States. The essence of the Six Nations' complaint is that unauthorized and unrepresentative individuals and groups have been permitted by the Indian Claims Commission and the Secretary of the Interior to prosecute and dispose of certain important

*"J.App." refers to the Joint Appendix which was before the Court of Appeals.

**The Commissioners named are Jerome K. Kuykendall, Brantley Blue, Margaret E. Pierce, John T. Vance, and Richard W. Yarborough.

legal claims of the Six Nations. Those claimants acted without permission of or notice to the Six Nations' Grand Council. The Six Nations asserts that such disposition of its legal rights by United States administrative agencies and officials is arbitrary and capricious, and that the Indian Claims Commission Act, on its face and as applied by the Commission and the Secretary, is violative of the Fifth Amendment to the United States Constitution.*

After a factual hearing, the District Court denied the Six Nations' request for declaratory and injunctive relief to invalidate the Commission's claims judgment and award and to prevent payment of the award by the Secretary. In affirming, the Court of Appeals ruled that Congress had, through the Indian Claims Commission Act, deprived the District Courts and Courts of Appeals of jurisdiction to review the constitutional claims of the Six Nations. The Court held that Congress had granted exclusive judicial review of this constitutional challenge to the Indian Claims Commission, a quasi-judicial administrative agency, and to the Court of Claims. The constitutional

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*The Six Nations also asserts that the Commission violated statutory rights.

issues were not reached in the Court's decision. it is only the jurisdictional issue which is presently before this Court.

The facts which are relevant to the jurisdictional issue were not significantly disputed below insofar as they pertain to the initiation and prosecution of the contested Six Nations' claim in the Indian Claims Commission. A claim for money damages for violation of Six Nations' treaty rights was filed in 1950 and pursued in the Commission for some 25 years without notice to or authority from the Six Nations. Permission to undertake this claims proceeding, known as Docket 84,* was expressly requested of the Grand Council by the attorney who filed and prosecuted the Docket 84 claim, and the Grand Council expressly

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*The complete caption of the Docket 84 claims petition is: THE SIX NATIONS, by Dean Williams, Jacob Jimerson, Ruby Charloe, David Charloe, Lewis Whitewing, Stewart Jamison, Peter Buck, Milton Babcock, Beryl Smith , Amanda Pierce, Julius Danforth, Oscar Archiquette, Sherman Skenadore, and Mamie Smith, members and representatives thereof; THE SENECA NATION OF INDIANS; THE CAYUGA NATION, by Stewart Jamison and Peter Buck, members and representatives thereof; THE ONEIDA NATION, by Julius Danforth, Oscar Archiquette, Sherman Skenadore, Mamie Smith, Milton Babcock, Beryl Smith and Amanda Pierce, members and representatives thereof; THE SENECA-CAYUGA TRIBE OF OKLAHOMA; THE ONEIDA NATION OF NEW YORK; THE ONEIDA TRIBE OF WISCONSIN; THE TUSCARORA NATION, Petitioners, v. THE UNITED STATES OF AMERICA, Defendant.

denied him its permission to proceed (J.App. 62, 67). Notwithstanding the denial of Six Nations authority, that same attorney shortly thereafter filed the Docket 84 petition, without notice to the Six Nations. He was permitted by the Commission to prosecute the claim although he did not have an approved attorney contract as required by statute, 25 U.S.C. 70n, 81 (1976). (J.App. 79).

The individually named claimants who appeared in Docket 84 as "members and representatives" were not affiliated with or part of the Six Nations at the time of filing or subsequently. They had no authority to represent the Six Nations (J.App. 126, 145-46). The group claimants acted in their own behalf and did not purport to speak for the Six Nations (J.App. 22).

The Six Nations declined to file a claim for money damages in the Indian Claims Commission because it has not chosen to dispose of its treaty rights and claims in that fashion. The Six Nations asserts present legal title and possessory rights to lands at issue in the Docket 84 case. As the Court of Appeals noted below, the Six Nations has been concerned that the Indian Claims Commission proceedings might preclude a subsequent claim that it still retains title to and interest in a large

amount of land in New York.* (App. infra, 3a, n.1).

The official records of the Docket 84 case show that final judgment had been entered by the Commission in December, 1973, before the Six Nations received notice. The parties to that case did not exercise their right of appeal to the Court of Claims. Docket 84 was thus finally concluded when the Six Nations first learned informally of its existence in 1974.** Upon learning of Docket 84, the Grand Council of the Six Nations wrote President Nixon a letter of March 23, 1974, in which it expressed its opposition to the Docket 84 case and stated that the claim had not been authorized by the Six Nations.

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*The threat of extinguishment which Docket 84 presents to Six Nations rights and interests is made evident in the Indian Claims Commission Act which provides that payment of any Commission claims award "shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy." 25 U.S.C. 7 See United States v. Gemmill, 535 F.2d 1145, 1149 (9th Cir. 1976).

**The opinion of the Court of Appeals reveals confusion about the timing and sequence of events which occurred when the Six Nations finally received notice of the Docket 84 claim in 1974. Clarification of these facts is essential to the jurisdictional issue, because the Court of Appeals held that the Six Nations' "only remedy" was to seek to intervene in the Docket 84 case before the Commission and if unsuccessful there to appeal to the Court of Claims (App. infra, 5a).

In July, 1975, the Six Nations received its first formal notice of Docket 84 in a letter from Interior Department officials to Chief Leon Shenandoah, Fire Keeper and titular head of the Six Nations Grand Council. This letter informed the Six Nations of an administrative hearing which Interior Department officials had scheduled for the purpose of preparing a plan for payment and distribution of the Docket 84 judgment award.

Although the Court below correctly noted the dates of these occurrences, it seems to have confused the Interior Department's payment planning process of 1975 with the adjudicative process of the Commission which had finally concluded in 1973.

The hearing about which the Six Nations received notice in July, 1975 is part of the administrative process leading to a proposed payment plan which the Secretary of the Interior is required to prepare and submit to Congress pursuant to the Distribution of Judgment Funds Act, 25 U.S.C. 1401 et seq. This payment planning process is an entirely separate proceeding which begins only after Indian claims awards are final and after award monies are appropriated by Congress. Congress appropriated funds to pay the Docket 84 award in December, 1974 (88 Stat. 1771, 1782). The Secretary was thereafter required to prepare a proposed payment plan,

after hearing and consultation with all potential recipients. 25 U.S.C. 1402, 1403 (1976). The Claims Commission and Court of Claims have no role whatsoever to play in this distribution planning process.

In sum, it is an uncontested fact that the Six Nations had no notice whatsoever of the Docket 84 case until after final judgment. Intervention in Docket 84 was unavailable to the Six Nations because Docket 84 was no longer before either the Indian Claims Commission or the Court of Claims when notice was finally received.

Upon learning of Docket 84, the Six Nations sought diligently to have the United States government correct its error of permitting the Docket 84 case to proceed without Six Nations authorization. After receiving the letter from Interior in July, 1975, the Grand Council sent a second letter to the White House, informing President Ford that the Docket 84 claimants had acted without authority of the Six Nations. (J.App. 29). This letter was followed by further correspondence and meetings with representatives of Interior. These efforts to dissuade the government from continuing to prepare for payment of the disputed Docket 84 award were to no avail. For reasons which are not stated in the record, the White House and Interior Department officials elected to proceed with preparation

for payment of the award rather than to take legal steps to reopen and reconsider the Docket 84 case.

The present legal action was filed in March, 1977, after it became apparent that the Secretary of the Interior was about to begin payment of the award monies. The Six Nations sought a temporary restraining order, permanent injunction and declaratory judgment to prohibit implementation of the payment plan which the Secretary of the Interior had prepared for the Docket 84 award.* Filed under the Administrative Procedures Act and 28 U.S.C. 1331 (1976), the complaint asserts that

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*To date only a small part of the Docket 84 award has actually been paid. There has not been tender and acceptance necessary to constitute payment of any of the award to the Six Nations. The courts below have not agreed with the government's novel arguments that "payment" has been accomplished by reason of the Commission judgment, Congressional appropriation of the award, or by transfer of appropriated funds from one U.S. Treasury account to another U.S. Treasury account. Final judgments against the United States are "paid out of" appropriations therefor. 28 U.S.C. 2517, 2518 (1976).

the Indian Claims Commission Act, on its face and as applied by the Commission, has violated the constitutional right of the Six Nations to be free from arbitrary and capricious disposition of their legal rights and claims. The courts below held that the district courts and courts of appeals are precluded from considering this constitutional challenge and that only the Indian Claims Commission and Court of Claims are authorized to hear the case.

REASONS FOR GRANTING THE PETITION

1. In foreclosing judicial review by the District Court of the Six Nations' complaint, the Court of Appeals has misconstrued the Indian Claims Commission Act and has decided that regular judicial review of allegedly unconstitutional statutes and administrative action may be deemed precluded even in the absence of the "clear and convincing evidence" of congressional intent to restrict review which this Court has consistently required. Johnson v. Robison, 415 U.S. 361 (1974); Estep v. United States, 327 U.S. 114 (1946). In reaching its conclusion, the Court below looked primarily at two provisions of the Act, 25 U.S.C. 70s and 70u. Section 70u provides that reports of final determinations of the Commission to Congress "shall have the effect of a final judgment of the Court of Claims." Section 70s provides that "either party may appeal from the

determination of the Commission to the Court of Claims, which Court shall have exclusive jurisdiction to affirm, modify, or set aside such final determination." Reading the face of these two statutes, the Court of Appeals ruled that Congress expressly determined that the district courts and courts of appeals shall have "no role" in the judicial review of the constitutional questions presented by the Six Nations (App. infra, 4a).

This conclusion is without support in the legislative history of the Act. First, the legislative history of Section 70u shows that the phrase "shall have the effect of a final judgment of the Court of Claims" was never intended by Congress to preclude district court review of the issues here presented. That language was added solely to insure that funds to pay Indian Claims Commission judgments would be appropriated as automatically as were funds to pay judgments of the Court of Claims.*

*See Hearings Before the Committee on Indian Affairs, U.S. Senate, 79 Cong., 2d Sess. on H.R. 4497, A Bill to Create an Indian Claims Commission, at 9,16,24-25,26,71-73,76 (1946) (hereinafter Senate Hearings); Hearings Before the Committee on Indian Affairs, House of Representatives, 79th Cong., 1st Sess. on H.R. 1198, and H.R. 1341, Bills to Create an Indian Claims Commission, at 81, 114 (1945).

The Conference Committee report shows that this was Congress' intention:

> Amendment No. 11. The House bill provided that the findings of the Commission shall have the effect of judgments of the Court of Claims and be paid in like manner. The Senate amended it so as to provide that when the awards of the Commission have been filed with Congress, "the amount found due by the Commission shall, upon appropriation therefore by Congress, be paid in such a manner as Congress shall provide." The Senate amendment, it was felt, left uncertain the status of final determination by the Commission. In order to make perfectly clear the intention of both houses that the determination of the Commission should, unless reversed, have the same finality of judgments of the court of claim, section 22(a) was rewritten to provide expressly that future Congresses may appropriate such sums as may be necessary to pay the final awards of the Commission. Cong. Rec. July 29, 1946, p. 10402, 79th Cong., 2d Sess.

Felix Cohen, one of the principal drafters of the Indian Claims Commission Act, made similar comments in his explanation of why the language was added to Section 70u:

> [I]t would permit Congress, if it so felt, to make the appropriation directly on the basis of the decision of the Commission rather

> than start the process all over by having a specific authorization bill brought in to allow Congress to make the appropriation for the specific item. . . .

Senate Hearings at 72.

Equally illuminating as to the intended effect of 25 U.S.C. 70u are the remarks of Mr. Bergson, Special Assistant to the Attorney General in Charge of Legislation, who also participated in the drafting of the Act:

> All this language [now 25 U.S.C. 70u] would do would be to prevent the possibility of a point of order being raised against an appropriation on the ground that there would have been no general legislation authorizing the appropriation.

Senate Hearings at 73.

There is not a shred of legislative history to support the conclusion that Congress intended by Section 70u to foreclose district court and court of appeals review of this case.

Second, when the Act speaks in Section 70s of the Court of Claim's "exclusive jurisdiction to affirm, modify, or set aside" a final determination of the Indian Claims Commission, it ties that language to the Court of Claims' regular appellate jurisdiction over Commission cases. Section 70s is not a finality provision or a general bar to all district court review. Rather,

it is a congressional specification of the court to which appeals shall be taken "by either party" to the Commission proceedings. Since the Six Nations was not a party in Docket 84 and had no notice or opportunity to become a party through intervention, this provision of the Act is plainly inapplicable. As this Court has ruled, a statutory authorization of appeals by parties does not include authorization of appeals by non-parties. In re Leaf Tobacco Board, 222 U.S. 578, 581 (1911); United Auto Workers v. Scofield, 382 U.S. 205, 209 (1965).

Without pointing to any expression of legislative intent to accomplish such an end, the Court below has announced that ambiguous language in a general statutory scheme which directs appeals by parties to the Court of Claims is sufficient to preclude district court review of constitutional challenges to the statutes and of administrative action under the statutes as it impacts upon non-parties. Although Congress has broad powers to delimit judicial review, this Court has always before required that preclusion of review be based on clear and convincing evidence of Congressional intent. The decision below would deny district court review without any showing whatsoever that Congress intended such result.

2. The decision below would completely deny judicial review of the Six Nations' constitutional claims, because no review has been available to the Six Nations in the Indian Claims Commission or the Court of Claims. As already discussed above, intervention before the Commission was unavailable to the Six Nations because the Commission's judgment was final before any notice of Docket 84 was received by the Six Nations. Since the parties to the Docket 84 case had not appealed the judgment to the Court of Claims, there was likewise no legal proceeding pending and no opportunity for intervention in that forum. Neither has any other appeal to the Court of Claims been available because the Six Nations has never been a "party" entitled to appeal under 25 U.S.C. 70s.

One further route to Court of Claims review is suggested in a footnote in which the Court below states that "in proper circumstances" the Court of Claims might entertain an "independent action" to set aside a Commission's judgment under that Court's analogue of Rule 60(b) of the Federal Rules of Civil Procedure (App. infra, 6a n.4). The present case does not present such "proper circumstances" because the Court of Claims rule is limited exclusively to cases of fraud upon the court:

> . . .This rule does not limit the power of the court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to set aside a judgment for fraud upon the court.
> Rule 152(b), Rules of the Court of Claims.

The present case rests upon constitutional grounds and not upon fraud. Moreover, the Court of Claims has only "assumed without deciding" that it could entertain an independent action by an Indian tribe to reconsider a judgment. Andrade v. United States, 202 Ct.Cl. 988, 994-96, 485 F.2d 660, 663-64 (1973). The Court of Claims has never in fact entertained such an action and has never held that it could do so.

Even if it were clear that such an "independent action" were available, the Court of Claims could not provide the relief required by plaintiff. Plaintiff seeks declaratory and equitable relief restraining the payment of the Docket 84 award and thereby avoiding the bar and discharge of 25 U.S.C. 70u. The Court of Claims could not obtain jurisdiction over the Secretary of the Interior, and it could not grant the essential declaratory and equitable relief. United States v. King, 395 U.S. 1 (1969).

Once each alternative judicial review possibility suggested by the Court of Appeals is fully

explored, it is seen that there is no judicial review available to the Six Nations other than that which it seeks in the present action. In its effect, the decision below completely forecloses judicial inquiry into the alleged unconstitutionality of part of the Indian Claims Commission Act and of certain administrative action taken under the Act. This result raises serious questions as to whether Congress has created an administrative body* and statutory scheme which are in significant part free from the constraints of the checks and balances of the Constitution.** Such a result would be especially problematical in light of Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977), where this Court made it clear that "particularly in this day" legislation concerning the rights of Indians will be scrutinized to determine whether it violates the protections of the Fifth Amendment.

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*Although the Indian Claims Commission has been terminated by Congress, cases pending before the Commission have been transferred to the Court of Claims for further hearing and disposition under the Act. 25 U.S.C. 70v.

**Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Leedom v. Kyne, 358 U.S. 184, 190 (1958).

3. The underlying constitutional issue presented for judicial review in this case is of great importance to the Six Nations and to other Indian nations and tribes. The Six Nations asks whether the United States Constitution will prevent Indian rights and claims from being disposed of by unauthorized persons,* as the same Constitution has been held to protect the rights of others from arbitrary and capricious disposition. Hansberry v. Lee, 311 U.S. 32 (1940); Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). The facts alleged below are a recent manifestation of a sad theme in the history of United States Indian affairs. Repeatedly, self-appointed Indians have worked in concert with others to dispose of Indian rights without proper authority of their peoples. Felix Cohen took note of this problem in his famous text on Indian law:

> One of the current popular superstitions about Indians is the notion that every Indian male over the age of 20 is either a chief or a "Big Chief." This superstition is of great help to those Indians or pseudo-Indians who seek to earn a respectable living by

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*These unauthorized claimants have been permitted to bring Docket 84 pursuant to 25 U.S.C. 70i, the principal focus of the Six Nations' constitutional attack. It would appear from the face of the Act that the Six Nations was also clearly entitled by statute to notice and opportunity to be heard in Docket 84. 25 U.S.C. 70p.

> selling snake oil to the sick, or by selling their fellow-tribesmen's land to land speculators or to the Federal Government, or by lecturing to women's clubs and congressional committees, or by endowing indigent lawyers with tribal business. It is generally very difficult to persuade those who have paid for or profited by such transactions with Indian "chiefs" that the Indian in question was not an officer of his tribe and had no tribal lands, tribal suits, or tribal wisdom to give away. It is, therefore, a matter of some concern to an Indian tribe that it should have the right to define a framework of official action and to insist that acts of individuals and groups that do not fall within that framework are not acts of the tribe.

Felix Cohen, Handbook of Federal Indian Law (1942), p. 126, n.32.

The failure to provide judicial review to the Six Nations in the present case would help assure that this dishonorable practice will continue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 1980

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1941

SIX NATIONS CONFEDERACY, APPELLANT

v.

CECIL ANDRUS, SECRETARY OF THE INTERIOR, ET AL., APPELLEES

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 77-0515)

Argued September 25, 1979

Decided November 30, 1979

Judgment entered this date

Robert T. Coulter, with whom *Nancy Stearns*, *Margaret S. Treuer*, and *Steven M. Tullberg*, were on the brief, for appellant.

Dean K. Dunsmore, Attorney, Department of Justice, with whom *James W. Moorman*, Assistant Attorney General, and *Jacques B. Gelin*, Attorney, Department of Justice, were on the brief, for appellees.

Before ROBINSON and ROBB, *Circuit Judges*, and DAVIS, *Judge*, United States Court of Claims.*

Opinion *per curiam*.

PER CURIAM: This is an effort by a group of Indians, claiming to represent the Six Nations Confederacy, to set aside an Indian Claims Commission award in favor of that Confederacy. The basis of the present suit is that the appellant was never properly apprised of the litigation before the Commission, and that the Indian Claims Commission Act, 25 U.S.C. §§ 70 *et seq.*, in allowing that litigation to proceed in appellant's absence, deprived it of constitutional rights.

The Six Nations were comprised of the Onondaga, Senaca, Mohawk, Oneida, Cayuga and Tuscarora Nations in New York and Pennsylvania. Appellant alleges that it is the historical government of the Six Nations and is the only entity entitled to bring action on behalf of that Confederacy. Nevertheless a suit under the Indian Claims Commission Act (Docket No. 84) was timely filed (in December 1950) in the Indian Claims Commission by other groups and individuals claiming to represent and on behalf of the Six Nations. That action proceeded before the Commission, allegedly without any knowledge on the part of appellant until 1974 or 1975. In 1970 the Commission found the United States liable with respect to certain of the lands involved in Docket No. 84, and in December 1973 a monetary award was made. This was duly reported to Congress which appropriated the money in December 1974, 88 Stat. 1771, 1782; the award was

* Sitting by designation pursuant to 28 U.S.C. § 293(a) (1976).

then credited to an account in the Treasury to the credit of the plaintiffs in Docket No. 84. Sometime later, the Interior Department, pursuant to Pub. L. No. 93-134, 87 Stat. 466, 25 U.S.C. §§ 1401 *et seq.* submitted to Congress a plan for the distribution of the judgment funds; not having been disapproved by either House of Congress, this plan became effective under the statute on March 4, 1977.

The present suit was then brought, in March 1977, by appellant in the District Court for the District of Columbia to enjoin the Secretary of the Interior from distributing the funds and also for a declaratory judgment that the Indian Claims Commission Act was constitutionally invalid in permitting the Commission to enter the judgment in Docket No. 84.[1] The defendants were the Secretary of the Interior and the members of the Indian Claims Commission.

The District Court denied a preliminary injunction and dismissed the action as failing to state a claim. The court's basic position was that the reporting to Congress (in March 1974) of the Commission's judgment in Docket No. 84 had the effect, under 25 U.S.C. § 70u, *infra*, of making the Commission's judgment a final judgment of the Court of Claims which the District Court could not set aside. This appeal is taken from that decision of the District Court.

[1] Appellant asserted, not only a right to participate in the distribution of the judgment money, but also that the parties purporting to represent the Six Nations in Docket No. 84 had improperly restricted that claim only to three of the 21 treaties under which the petition in that proceeding had alleged that the United States failed to fulfill its obligations. Appellant was also concerned that distribution of the award might preclude a subsequent claim by appellant that it still retained title to and an interest in a large amount of land in New York. *See* 255 U.S.C. § 70u, *infra*.

When Congress enacted the Indian Claims Commission Act in 1946 it created a special tribunal to try pre-1946 Indian claims filed under that statute, and it also provided a specific method of review. Act of Aug. 13, 1946, 60 Stat. 1049. 25 U.S.C. §§ 70, *et seq.* A quasi-judicial tribunal, the Indian Claims Commission, was to entertain and try those cases; appeal from the Commission's decisions was to the United States Court of Claims, with further review on certiorari to the Supreme Court. 25 U.S.C. § 70s. The district courts and the court of appeals were given no role.[2]

In addition, the Claims Commission Act required the Commission, "after the proceedings have been finally concluded," to report its determination (including any judicial review) to Congress, 25 U.S.C. § 70t, and provided that the final report "shall have the effect of a final judgment of the Court of Appeals," 25 U.S.C. § 70u. Payment of the final award was thereupon to be appropriated, and "[t]he payment of any claim, after its determination in accordance with this chapter [Act], shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy." *Ibid.*

As of September 30, 1978, Congress dissolved the Indian Claims Commission, and transferred its undecided cases to the Court of Claims. Act of Oct. 8, 1976, Pub. L. No. 94-465, 90 Stat. 1990, as amended by the Act of July 20, 1977, Pub. L. No. 95-69, 91 Stat. 273. The Commission is therefore no longer in existence, though it was still viable when the District Court's judgment below was entered on July 12, 1977.

---

[2] Instead, the Court of Claims was given "exclusive jurisdiction to affirm, modify, or set aside" a Commission determination. 25 U.S.C. § 70s.

Whatever may have been the situation if the Commission had been dissolved before appellant found out about the proceedings in Docket No. 84, we are satisfied that, having discovered those proceedings no later than 1975,[3] at a time when the Commission was still alive and active, appellant's only remedy was to seek to intervene in that case before the Commission and if unsuccessful there to appeal to the Court of Claims. (It is noteworthy that the Commission was still in existence even when the present suit was brought in the District Court in March 1977.)

Because Congress enacted a special and exclusive system for determination of claims under the Indian Claims Commission Act, appellant could not choose for itself another avenue of relief. Congress had selected the route which had to be followed. It makes no difference that appellant raises constitutional issues. The Commission could consider those, and if it did not the Court of Claims —which is an Article III court, *see Glidden v. Zdanok*, 370 U.S. 530 (1962)—certainly could do so on appeal. If that court agreed with appellant, and found no impediment to redress, it could set aside the Commission's determination in No. 84. *Cf.*, *Western Shoshone Legal De-*

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[3] On appellant's own presentation, there is no doubt that it heard about Docket No. 84 no later than the middle of 1975. Chief Leon Shenandoah, Fire Keeper or head of appellant, testified below that he received formal notice of the award in Docket No. 84 and of a hearing to be held concerning disposition of the award on July 23, 1975. There was further correspondence and meetings with representatives of the Interior Department, but appellant never participated in the further proceedings in Docket No. 84. In 1974 Chief Shenandoah (and another chief, secretary of the appellant) informally learned of the existence of Docket No. 84 and wrote (on March 23, 1974) to President Nixon, saying that that claim had not been authorized by appellant.

fense and Education Ass'n v. United States, 209 Ct. Cl. 43, 531 F.2d 495, *cert. denied*, 429 U.S. 885 (1976).[4]

It follows that the District Court correctly denied a preliminary injunction and dismissed this action, even if we assume *arguendo* that there was technical federal-question jurisdiction.[5]

Affirmed.

[4] The Court of Claims indicated in *Andrade v. United States*, 202 Ct. Cl. 988, 994-96, 485 F.2d 660, 663-64 (1973), *cert. denied*, 419 U.S. 831 (1974), that in proper circumstances it might also entertain an "independent action" (under that court's analogue of Rule 60(b), F.R. Civ. P.) to set aside a Commission judgment.

[5] Also, we need not determine whether this action is now moot as to the five members of the Indian Claims Commission in view of the Commission's dissolution on September 30, 1978. In any event, the Secretary of the Interior remains in the case.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1941 September Term, 1979

Six Nations Confederacy,
Appellant

v. Filed Jan. 4, 1980

Cecil Andrus, Secretary of the Interior, et al.

BEFORE: Wright, Chief Judge; McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, and Mikva, Circuit Judges

ORDER

The suggestion for rehearing en banc filed by appellant (Six Nations Confederacy) having been transmitted to the full Court and no judge in regular active service having requested a vote with respect thereto, it is

ORDERED, by the Court, en banc, that appellant's aforesaid suggestion for rehearing en banc is denied.

Per Curiam

FOR THE COURT:

/s/

GEORGE A. FISHER
Clerk

Supreme Court, U. S.
FILED
MAY 23 1980
MICHAEL RODAK, JR., CLERK

No. 79-1551

In the Supreme Court of the United States

OCTOBER TERM, 1979

SIX NATIONS CONFEDERACY, PETITIONER

v.

CECIL ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 610 F.2d 996. The opinion of the district court is reported at 447 F. Supp. 40.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1977, and a petition for rehearing was denied on January 4, 1980 (Pet. App. 7a). The petition for a writ of certiorari was filed on April 3, 1980. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a final judgment of the Indian Claims Commission reported to Congress may be collaterally attacked in the United States district court.

STATEMENT

Petitioner brought this suit in the United States District Court for the District of Columbia to challenge a final judgment entered by the Indian Claims Commission in Docket No. 84, *Six Nations* v. *United States*, 32 Ind. Cl. Comm. 440, 460 (1973). The proceedings before the Indian Claims Commission were brought on behalf of the Six Nations by the Seneca Nation, the Seneca-Cayuga Tribe of Oklahoma, the Tuscarora Nation, the Oneida Tribe of Wisconsin and several named individuals of the respective tribes forming the Six Nations.[1] Petitioner, however, alleges that it is the only true and historical representative of the Six Nations, and seeks to void the Indian Claims Commission judgment by claiming that only petitioner could properly represent the Six Nations.[2] Both the district court and the

[1] The Six Nations (sometimes referred to as the Iroquois Confederation) was historically comprised of the Onondaga, Seneca, Mohawk, Oneida, Cayuga and Tuscarora Nations and were located in western New York. *Six Nations* v. *United States*, 173 Ct. Cl. 899, 901-902 (1965); U.S. Dept. of the Interior, *Federal Indian Law* 966-967 (1958). Petitioner's witnesses admitted that the tribal entities in the action before the Indian Claims Commission were descendants of the Six Nations (May 26, 1977 Tr. 30-33, 56).

[2] The decision of the Commission was reported to Congress pursuant to 25 U.S.C. 70t. 120 Cong. Rec. 9630, 10249 (1974). Funds in payment of the judgment were appropriated in the Act of December 27, 1974, Pub. L. No. 93-554, 88 Stat. 1771,

court of appeals found that they were unable to entertain petitioner's action. The district court found that petitioner failed to state a claim upon which relief can be granted. *Six Nations Confederacy* v. *Andrus*, 447 F. Supp. 40, 43 (D.D.C. 1977). In affirming, the court of appeals held that exclusive jurisdiction to determine petitioner's claim was in the Indian Claims Commission or the Court of Claims (Pet. App. 5a). Both courts concluded that they would not set aside a judgment which has "the effect of a final judgment of the Court of Claims." 25 U.S.C. 70u(a).

ARGUMENT

The decision of the court of appeals affirming the district court is correct, lacks general importance, and does not warrant review by this Court.

1. Petitioner's principal contention (Pet. 13-17) is that it may collaterally attack in the district court a judgment which, by statute, 25 U.S.C. 70u(a), has the effect of a final judgment of the Court of Claims. However, Congress specifically and unambiguously granted to the Court of Claims the "exclusive jurisdiction to affirm, modify, or set aside" a final decision of the Indian Claims Commission, 25 U.S.C. 70s(b), with review in this Court by petition for a writ of certiorari. 25 U.S.C. 70s(c). Congress may

1782, and immediately thereafter placed in an account to the credit of the petitioners before the Indian Claims Commission. *Six Nations Confederacy* v. *Andrus*, 447 F. Supp. 40, 42 (D.D.C. 1977), aff'd, 610 F.2d 996, 997 (D.C. Cir. 1979). Pursuant to the Act of October 19, 1973, Pub. L. No. 93-134, 87 Stat. 466, 25 U.S.C. 1401 *et seq.*, a plan for the distribution of this judgment became effective on March 4, 1977. *Ibid.*

properly prescribe the courts in which such judicial review may be had and when Congress has so chosen, the avenue of review is exclusive and collateral attack is barred. *City of Tacoma* v. *Taxpayers*, 357 U.S. 320, 336-337 (1958); *Carey* v. *O'Donnell*, 506 F.2d 107, 110 (D.C. Cir. 1974), cert. denied, 419 U.S. 1110 (1975).

While petitioner alleges that it did not know of the Indian Claims Commission proceeding in time to raise its objections before the Commission or the Court of Claims, the Court of Claims, as the court of appeals noted (Pet. App. 5a-6a & n.4), has indicated that its Rule 152(b), the analogue to Rule 60(b) of the Federal Rules of Civil Procedure, might be used to obtain the relief sought by petitioner. See *Andrade* v. *United States*, 485 F.2d 660, 663-664 (Ct. Cl. 1973), cert. denied, 419 U.S. 831 (1974). Because petitioner has not yet sought such relief, petitioner's claim (Pet. 18-19) that the remedy is inadequate is premature.[3]

2. Petitioner's constitutional attack on the judgment is, in any event, without merit. The Indian Claims Commission Act required all claims to be filed

[3] The heart of petitioner's contention (Pet. 5) is the allegation that the parties who claimed to represent the Six Nations before the Indian Claims Commission were not authorized to represent the Six Nations. This presents an issue of alleged fraud upon the court. *Toscano* v. *Commissioner*, 441 F.2d 930, 936 (9th Cir. 1971). See *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.*, 322 U.S. 238, 245-246 (1944). This is relief which the Court of Claims has indicated it might grant under its Rule 152(b). *Andrade* v. *United States, supra.*

before August 13, 1951. 25 U.S.C. 70k. Petitioner failed to file any claim on behalf of the Six Nations. Had the tribal representatives who did file suit failed to do so, the Six Nations would have lost their claim under the Act altogether. To be sure, the Confederacy asserts that it would have preferred to forego a monetary claim in favor of a proceeding to establish its continuing title to the lands involved (Pet. 8). But, in the absence of fraud, the Commission cannot be faulted for accepting the choice indicated by apparently authorized representatives to pursue the Indian Claims Commission Act remedy.

There is no suggestion that the Commission violated the Act in treating the plaintiffs before it as proper applicants. The representational scheme of 25 U.S.C. 70i is clearly within Congress's power to place limitations on waivers of sovereign immunity, *Ex parte Bakelite Corp.*, 279 U.S. 438, 452 (1929); *McElrath* v. *United States*, 102 U.S. 426, 440 (1880), and rationally tied to the government's obligations to Indian tribes in that the whole purpose of the Indian Claims Commission Act was to put to rest the long-standing, historical grievances of Indian tribes. See *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 85 (1977).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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MAY 1980

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IN THE

Supreme Court of the United States

October Term 1979

No. 79-1551

SIX NATIONS CONFEDERACY,
Petitioner,

v.

CECIL ANDRUS, Secretary of the Interior, et al.,
Respondents.

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. In its brief in opposition to certiorari, the government misleads the Court about the central issue of this case. The government suggests that the disputed Indian Claims Commission case had admittedly been properly brought by descendants of the Six Nations Confederacy. (Brief For The Federal Respondents In Opposition, p. 2, n.1) In fact, the extensive evidentiary hearing held before the District Court establishes just the opposite. The witnesses for petitioner testified that the claimants who brought the Six Nations claim were not descendants of or successors in interest to the lawful, political authority of the Six Nations. The uncontroverted testimony shows that both the individual claimants and the "tribal entity" claimants were descendants of the Six Nations only in the sense that they may have been able to trace their personal ancestry, their blood relationship, to the member nations of the Six Nations Confederacy. Genetic relationship is not, of course, sufficient to confer lawful authority on those individual and group claimants to assert and dispose of legal claims of the Six Nations Confederacy.

Petitioner's first witness, a Dehora or Faith Keeper and authorized spokesperson for the Six Nations Confederacy, first briefly described the history, organization and governing procedures of the Six Nations Confederacy. (Tr.* 24-29) He testified that the claimants in the disputed Indian Claims Commission case acted without authority of the Six Nations Confederacy:

> A....And our response [upon learning of the Six Nations claims case which had been brought in the name of the Six Nations Confederacy in the Indian Claims Commission], of course, was to look at the petitioners, who was it that was involved in this, and the principal was a man by the name of Williams of the Seneca nation, the elective Seneca nation that we talked about, who does not have the authority to speak for the Six Nations to begin with and who had separated themselves since 1848, very specifically from our processes and now beginning, as we can in this document, was speaking on behalf of the Six Nations, so he was illegal.... (Tr. 46-47)
>
> . . .
>
> Q. Joa Quis On, you have testified that the Oneidas of Wisconsin and I believe the Seneca, Cayuga, the people of Oklahoma and certain others were descendants of the Six Nations. Were

*Transcript references are to the hearing of May 26, 1977 before the District Court. This transcript is reproduced in the Joint Appendix below (pp. 80-185).

> those people that you so identified, were those people members of the Six Nations?
>
> A. Were they or are they?
>
> Q. Are they?
>
> A. No, they are not.
>
> Q. Well, were they in the period 1946 to 1956?
>
> A. No, they were not.
>
> Q. Did they have any legal relationship to your knowledge to the Six Nations Confederacy?
>
> A. No, they did not.... (Tr. 57-58).

The same witness gave additional testimony on this point. (Tr. 30-32)

Petitioner's second witness, a clan mother of the Onondaga Nation and authorized spokesperson for the Six Nations Confederacy, presented similar testimony:

> Q. To your knowledge, were the persons [named as claimants in the disputed Indian Claims Commission case]...members of the Six Nations Confederacy?
>
> A. No. They had alienated themselves from the Six Nations.
>
> . . .
>
> Q. At any time to your knowledge, did the Six Nations ever authorize

any of those persons to file a claim on its behalf?

A. No. (Tr. 66-67)

Her testimony also confirmed that the "tribal entity" claimants had not been authorized to file a claim on behalf of the Six Nations Confederacy. (Tr. 68,69)

Petitioner's third witness, a sub-chief for the bear clan of the Mohawk Nation and authorized spokesperson for the Six Nations, testified that under the law of the Six Nations only the Grand Council of the Six Nations Confederacy is authorized to act on matters concerning Six Nations land rights. (Tr. 74) He then corroborated the preceding testimony about the lack of authority of the individuals and groups which brought the disputed claims case in the Indian Claims Commission. (Tr. 76-77)

None of this extensive testimony by knowledgeable and authoritative representatives of the Six Nations Confederacy was contradicted. The government called no rebuttal witnesses. The record below is devoid of any evidence that the individuals and groups who brought the disputed claims case had any legal authority to take such action on behalf of the Six Nations Confederacy.

Contrary to the government's suggestion, there is the strongest likelihood that petitioner

will prevail on the merits should certiorari be granted, federal court jurisdiction established, and trial of the substantive issues directed by this Court.

2. Petitioner has argued that the Indian Claims Commission Act is unconstitutional on its face insofar as it permits the arbitrary disposition of Six Nations legal rights by groups and individuals who have acted without notice to or authority of the Six Nations government. In addition, petitioner asserts in its amended complaint of May, 1977, that the Indian Claims Commission has applied the Act in an unconstitutional manner and has also violated several provisions of the Act. (Amended Complaint For Declaratory And Injunctive Relief, paras. 50-52) Since both the substance and application of the Act are at issue in this action, the government is incorrect in its statement that "There is no suggestion that the Commission violated the Act in treating the plaintiffs before it as proper applicants." (Brief For The Federal Respondents In Opposition, p.5)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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